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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CREIG LEE DILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals misconstrue the Jencks Act, 18 U.S.C. § 3500, by creating barriers to the production of documents which frustrate the Congress's intent in passing the Jencks Act and also the basic fair trial purposes which it was designed to serve? More specifically:

a) Does the Jencks Act require production of transcripts of a witness's earlier testimony containing verbatim statements relating to the subject matter of his direct testimony when these statements are in the possession, custody and/or control of the government, or does the Jencks Act instead have an implied "public records" exception justifying the concealment from the accused of such verbatim prior statements of the witness based on the theory that

they might be found by him in court files somewhere?

b) Can the Jencks Act be invoked only by a "ritual of words," incanting the name of the statute each time it is relied upon, or is it sufficient to use the essential language of the statute in a request reasonably calculated to draw the court's attention to the nature of the request?

2. When a police officer testifies for the prosecution as an expert on criminal behavior, basing his testimony on his prior investigations, and particularly when the prosecution admits he has testified in other trials concerning those investigations, do the Due Process Clause of the Fifth Amendment to the United States Constitution and the Compulsory Process and Confrontation Clauses of the Sixth Amendment require production, upon request, of the wit-

ness's testimony at the prior trials which relates to the subject matter of his present testimony, of reports of the other investigations upon which the witness bases his present testimony, and the manuals, guidelines and regulations pursuant to which those investigations were conducted?

3. Should the federal courts admit into evidence, in criminal trials, pseudo-expert testimony, purporting to describe how drug importers operate, but having no real relevance to any issue in the case, providing no basis for contrast with innocent behavior, and ultimately amounting to the government vouching for the strength of its own case?

4. Is a defendant who supplies lawful goods to the members of a conspiracy, with no showing of a long, continuous course of dealing, of instigation by him, of any stake in the venture on his

part, or of any knowledge of the nature of the conspiracy, entitled to an acquittal based on United States v. Falcone, 311 U.S. 205 (1940); Direct Sales Co. v. United States, 319 U.S. 703 (1943); and Ingram v. United States, 360 U.S. 672 (1959); in other words, are those cases, and recent cases from other circuits following them, still good law?

5. Should the conflict among the federal courts be resolved to require, upon request by the accused, jury instructions on the defendant's theory of the case, and particularized jury instructions tailored to the facts of the case, rather than abstract pattern instructions?

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Beck, A New Attack on Drugs, Newsweek, July 20, 1981, 30. 56

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IN THE

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October Term, 1982

CREIG LEE DILL,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Creig Lee Dill, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals* reported in 699 F.2d 18 (1st Cir. 1983), appears in the Appendix hereto (App. 1a). No opinion was rendered by the District Court pertaining to the issues herein.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on January 25, 1983. A timely petition for rehearing was denied on March 9, 1983 (App. 112a). Upon Petitioner's application, an extension of time to file this petition was granted to and including June 7, 1983. (App. 113a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

*The Court of Appeals consolidated the appeal of Creig Lee Dill with his co-defendants Hensel, Case, Duke, Hubbard, Standley and Wells. Hensel filed a petition for writ of certiorari on April 29, 1983, raising other issues. The petition was docketed as No. 82-1782 and was denied on May 31, 1983. The United States was the Appellee below.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The following provisions are set forth in pertinent part in the Appendix: U. S. Const. Amend V, due process clause; U. S. Const. Amend VI, compulsory process clause and confrontation clause; 18 U.S.C. § 3500 (The Jencks Act); Fed. R. Evid. 401; Fed. R. Evid. 402; Fed. R Evid. 403.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

On June 12, 1980, a one count indictment was returned in the United States District Court for the District of Maine, charging the Petitioner, Creig Lee Dill, along with co-defendants Hensel, Case, Downing, Duke, Hubbard, Storey, Standley and Wells with violation of 21 U.S.C. §§ 846 and 963. The indictment charged the defendants with conspiring to violate 21 U.S.C. §§ 841(a)

(1), 952 and 960 by conspiring to import and to possess with intent to distribute 18.7 tons of marijuana. The indictment alleged that, as part of the conspiracy, property at Turkey Cove, Tenants Harbor, Maine, was to be purchased for use as a landing site, that the vessel PATRICIA would be purchased and used to transport the marijuana, and that the vessel SUNSHINE would be acquired to assist the PATRICIA in navigating and "off-loading."

Petitioner Dill pled not guilty. Various pretrial motions were filed, including motions requesting Jencks material, material relating to expert witnesses or both. The government was ordered to produce all Jencks material five days prior to trial. Petitioner stood trial with all co-defendants except Downing, who had been severed. The trial began on April 29, 1981, after a week of suppression hearings.

Petitioner made all appropriate motions for judgment of acquittal but they were denied. He also timely requested the court to give three proposed charges to the jury relating to his theory of defense, based primarily on United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940). (The court had announced that it would consider the substance of charges submitted to it but would phrase the charge itself.) The court declined to give any of the proposed instructions and instead gave its regular, generalized jury charge.

The jury deliberated during three days. When it asked for additional instruction on conspiracy, the court read the original abstract charge in a somewhat summarized fashion. On May 15, 1981, the jury found all of the defendants guilty except Storey. Petitioner's

post-trial motions were denied.

On July 16, 1981, the court sentenced Petitioner to five years in prison and a fine of $10,000.00. Petitioner filed a timely Notice of Appeal on the same day.

The Court of Appeals affirmed the conviction on January 25, 1983 (App. 1a). Petitioner's timely petition for rehearing with suggestion for rehearing en banc was denied on March 9, 1983 (App. 112a).

(ii) Statement of Facts

Petitioner was "linked," as the Court of Appeals put it (App. 86a), by circumstantial evidence to a marijuana importation, possession and distribution scheme of his co-defendants at a waterfront lot in Turkey Cove, Tenant's Harbor, Maine. In April, 1980, Petitioner stayed at three different hotels in Maine, registered in his own name. He bought a 32-foot sport fishing boat,

SUNSHINE, in Hubbard's name, and paid for it with four checks. He had the standard radio and navigation equipment installed on it. Although Petitioner told the sellers he planned to take it to Massachusetts, it was later seen at Turkey Cove. Petitioner disappeared completely from the government's case after the boat appeared at the lot. When Hubbard was arrested more than a month later, he carried two slips of paper with Petitioner's name and phone number on them, among others; "Craig 300" was cryptically written in a notebook in the truck in which Hubbard was found. Significantly, no direct evidence exists that Petitioner knew the sports fishing boat he purchased would be used to assist any marijuana conspiracy or that he agreed to participate in any such conspiracy.

Over objection, DEA Special Agent

Michael Cunniff* testified, based on his training and experience investigating drug smuggling on the Maine coast, that drug smugglers in Maine typically had used, among other items, small "pilot" vessels as guide or communication vessels, and had communicated by radio.

Defendants had made several pretrial motions for discovery of Jencks material, material relating to expert witnesses, or both. The trial court had ordered the government to produce all Jencks material five days before trial. While Cunniff was still on the stand, Defendants moved for discovery of reports of the prior investigations about which he testified, along with DEA manuals and policies relating to them. The motion was denied, and a subpoena for the items was quashed.

The court refused to give the

*Cunniff was also the case agent, and testified for parts of four days about the investigation and the evidence against the defendants.

"theory of defense" instructions requested by Petitioner.

The jury deliberated during three days. They asked for additional instruction on conspiracy, and were read in summary fashion the same general abstract instructions that the court had originally given. All of the defendants but one were convicted.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ANSWER TWO IMPORTANT QUESTIONS OF THE SCOPE, LIMITS AND PROCEDURES OF THE JENCKS ACT: A. DOES IT REQUIRE PRODUCTION OF VERBATIM TRANSCRIPTS, IN THE POSSESSION OF THE GOVERNMENT, OF A WITNESS'S PRIOR TESTIMONY RELATING TO THE SUBJECT MATTER OF HIS TRIAL TESTIMONY, OR DOES IT CONTAIN A "PUBLIC RECORDS" EXCEPTION; AND B. WHETHER A REPEATED REQUEST FOR JENCKS MATERIAL IS SUFFICIENT IF IT CONTAINS THE ESSENTIAL WORDS OF THE STATUTE, OR MUST IT CONTAIN THE MAGIC WORD "JENCKS".

In a concurring opinion joined by Justice White, Justice Clark noted

that "the delineation of the limits of the Jencks Act has been peculiarly the province of this Court." Evola v. United States, 375 U.S. 32 (1963) (Clark, J., concurring in part and dissenting in part). Indeed, this Court has on many occasions granted certiorari to determine whether specific documents or kinds of statements were producible statements under the Jencks Act, or "to determine the scope and meaning" of the Jencks Act. Palermo v. United States, 360 U.S. 343, 346 (1959). See Lev v. United States, 358 U.S. 903 (1958), aff'd by an equally divided court, 360 U.S. 470 (1959) (whether "summaries and reports of prior statements made by witnesses to a government investigator" were producible under the Act); Clancy v. United States, 365 U.S. 312 (1961)(whether non-contemporaneous written memoranda of interviews, signed by the witnesses and relating to

the subject matter of their testimony, were Jencks statements); Simmons v. United States, 390 U.S. 377 (1968) (whether certain photographs were statements or parts of statements producible under the Act).

More recently, in Goldberg v. United States, 425 U.S. 94 (1976)(Brennan, J.), certiorari was granted to decide whether the Jencks Act contained an "attorney's work product" exception, and what procedure trial courts should follow in determining whether requested materials are producible statements. The Court said the case presented "important questions of construction and application of the Jencks Act . . . ." 425 U.S. at 96.

This case presents two equally important issues of the construction and application of the Jencks Act, and certain conflicts as well.

A. The Public Records Exception.

The Defendants made numerous pre-trial Jencks requests. The district court ordered the government to produce all Jencks material five days prior to trial. During the trial, Defendants moved for Jencks material and other reports and manuals relating to DEA Special Agent Cunniff's testimony. The request was denied and a subpoena for the documents was quashed. Thus, the government neither identified nor produced these prior statements and related materials -- not even to the trial court for in camera consideration.

In its brief to the court of appeals, the government for the first time let slip that "S/A Cunniff had personally testified before the judge presiding over this trial in virtually all those other cases [from which he drew his testimony about the modus operandi of drug smug-

glers resulting from his investigations of drug smuggling in Maine]." The First Circuit held that transcripts of the witness's prior testimony were not producible statements under the Jencks Act and that failure to produce them was harmless because they were part of the public record. (App. 99a-100a) The Court of Appeals refused to remand the case -- not even for an evidentiary hearing for the trial court to inspect these documents and determine the impact of their non-disclosure upon the trial. Hence, a host of transcripts, i.e., verbatim statements, reports and/or other materials relating to the expert testimony of the star witness against Petitioner exist but have never been made a part of the record in this case.

The court's creation of a public records or trial testimony exception to the Jencks Act, when the statements

requested fall clearly within the plain language of the Act, works a major repeal of the statute.

The First Circuit held that a witness's testimony at a prior trial is never a Jencks Act statement even though this verbatim statement may be in the possession, custody and control of prosecutors and its existence unknown to counsel for the accused.*

Thus, the Court of Appeals has, with no caselaw, statutory, or historical

*The Court of Appeals relied upon United States v. Baker, 358 F.2d 18 (7th Cir.), cert. denied, 385 U.S. 869 (1966), for that radical proposition. If that is the holding of Baker, then two circuits have effectively amended the Jencks Act and raised a very important question of federal law. In candor, we believe that the First Circuit misconstrued Baker. What Baker really stands for is that untranscribed court reporter's notes, in the possession of a court reporter, are not in the possession of the prosecutorial arm of the government, and thus the prosecutor has no duty to have them transcribed and to produce them, absent a pre-trial request. United States v. Lurz, 666 F.2d 69, 79 (4th Cir. 1981), cert. denied, 102 S.Ct. 1642 (1982). See also United States v. Munroe, 421 F.2d 644 (5th Cir. 1970) (apparently limiting Baker to its facts). That is not the problem

footnote continued . . .

authority, sua sponte created an exception to the Jencks act for verbatim transcripts of trial testimony and, presumably, for any statement which meets the plain language of the statute but is part of some public record.

The consequences for the administration of justice in the federal courts are staggering. Now the government is free to withhold transcripts of the testimony of government witnesses even though the prosecutor has the transcripts in hand and uses them to prepare for trial. Further, this decision places on defendants the insurmountable burden of combing all of the court files in 95 federal judicial districts, twelve

footnote continued from page 14:
posed here, because Defendants in the trial court made numerous pre-trial requests and because at least one of the cases cited by the government (we have no way of knowing how many more there may have been) involved an appeal, for which the testimony was more than likely transcribed. See United States v. Weber, 668 F.2d 552 (1st Cir.), cert. denied, 102 S.Ct. 2038 (1982).

circuits and an incredible number of state and local tribunals in the hope of finding prior statements of accusing witnesses. These never-ending searches will often have to be conducted by court appointed attorneys at government expense. Thus, the Court of Appeals has opened a tremendous drain on the finances of defendants and taxpayers. Moreover, it is needless to divert scarce resources to such a search since all the transcripts are already, by definition, in the possession, custody or control of the government and could be produced routinely. Finally, the decision works a practical repeal of the Jencks Act, and a defeat, for all practical purposes, of the accused's rights to basic materials for impeachment of witnesses and to a fair trial. See, e.g., Goldberg v. United States, 425 U.S. 94, 105, 107 (1976).

Nine times out of ten, neither pri-

vate nor appointed counsel will be able to find all the transcripts of prior testimony without help from the Jencks Act. Such an onerous task could never be completed by a defendant or his counsel prior to trial. But, since such transcripts do exist, they will often come to the attention of the accused after the trial. A flood of post-conviction proceedings will result.

Certiorari should be granted, as it was in Goldberg, to decide this important question of the construction and administration of the Jencks Act, and to prevent the imposition of this overwhelming burden on criminal defendants, the federal courts, and the taxpayers.

B. The "Ritual of Words" Requirement.

The Court of Appeals ruled that Petitioner "argued no . . . Jencks Act request to the court below, and [is] therefore barred from pursuing [that

claim] here." (App. 98a). This claim of waiver is not supported by the facts or the law and will not prevent this Court from reaching the public records exception issue any more than it kept the court below from pronouncing that exception. Indeed, the finding of a waiver is so outrageous that it presents another good reason for granting certiorari.

The Defendants had made numerous pretrial Jencks requests. The trial court had already ordered production of all Jencks material. Further, a portion of Petitioner's discovery request was phrased in the essential words of the Jencks Act: "portions of . . . report[s] that relate to the use of items such as he testified to." The opinion, therefore, can only mean that Petitioner's essential right to material under the Jencks Act can be defeated by his mere failure to incant the magic word "Jencks"

again in his final request.

This holding conflicts with long standing rulings of the District of Columbia and Second Circuits that no "ritual of words" is required to invoke the Jencks Act, so long as the request makes plain to the court what is requested. Howard v. United States, 278 F.2d 872 (D.C. Cir. 1960) ("May I see it?" sufficient); United States v. Aviles, 315 F.2d 185, 190-191 (2d Cir. 1963), vacated on other grounds, 375 U.S. 32 (1965) (court refused "to hold that such requests be couched in formal or technical language" or to require "the niceties of ancient common law pleading."). This was, until recently, the law in the First Circuit as well. See, e.g., United States v. Principe, 499 F.2d 1135, 1139 (1st Cir. 1974); United States v. Del Toro Soto, 676 F.2d 13, 17 (1st Cir. 1982) (remanding as to co-defendant who did not

raise a Jencks claim but whose case was "affected by" it).

Because it safeguards vital rights of confrontation and cross examination, the Jencks Act has long been liberally construed to effect its purpose. If that policy is to be reversed -- if "the niceties of ancient common law pleading" are to be imposed on it, then this important question of construction and application of the Jencks Act should be decided by this court.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT'S DECISION UPHOLDING THE TRIAL COURT'S DENIAL OF DISCOVERY CONFLICTS WITH HOLDINGS OF OTHER FEDERAL COURTS UNDER THE DUE PROCESS, COMPULSORY PROCESS AND CONFRONTATION CLAUSES OF OUR CONSTITUTION.

A. Due Process.

Assuming, arguendo, that the prior statements of the witness Cunniff and associated materials were not producible

under the Jencks Act, due process would require their production because they were manifestly relevant. United States v. Matfield, 4 M.J. 843 (ACMR 1978). The "constitutional overtones" of the decision in Jencks v. United States, 353 U.S. 657 (1957) have been mentioned frequently by Congress and the Court. See Palermo v. United States, 360 U.S. 343, 362-63 n.2 (1959)(Brennan, J., concurring). Cf. United States v. Valenzuela-Bernal, ___ U.S.___, 102 S. Ct. 3440, 3449 (1982) (Rehnquist, J.)(dicta that Jencks violation can be a due process violation as well). The compulsory process clause, the confrontation clause, the due process right to the fair administration of justice are all "close to the surface" of the Jencks case and the Jencks Act. Palermo, at 343; Campbell v. United States, 365 U.S. 85, 92 (1961)(Brennan, J.). In the present case, those considerations

tower above the surface.

Petitioner was denied access to statements by the government's star witness which related to testimony the Court of Appeals found substantial in determining his guilt. The government argued, and the court ruled, that the requested statements were not material (App. 94a, 96a, 97a). Yet, the court also ruled that Cunniff's testimony was relevant (App. 91a-93a). The requested items related directly to the subject matter of his testimony. If Cunniff's testimony was relevant to the government's case (and in fact a major point on which the panel relied in upholding the sufficiency of the evidence)(App. 87a), then statements related to that testimony, which were the only means of impeaching it, must have been relevant, material and essential to the cross-examination of the witness and/or prepa-

ration of the defense. The Jencks Act and its constitutional correlatives, if they mean anything, mean that the government must disclose this type of vital impeachment material.

How could the Petitioner confront Cunniff's 'this is the way marijuana smugglers behave' testimony? Only by examining and challenging the underlying investigations on which it was based. The fact that the court considered this testimony so significant emphasizes its importance to the case, and how essential it was to enable Petitioner to effectively cross-examine the agent on this point. If the prosecution wishes to protect such documents from discovery, it must keep its pseudo-experts off the witness stand. (See Point III below.) The prosecution cannot with impunity introduce such evidence, argue that it is relevant because it shows the defendant's connec-

tion to the conspiracy, rely on it in arguing that the evidence was sufficient to support the conviction, and then withhold the documents necessary to impeach the testimony because it is "not material" or is "burdensome." "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944)(L. Hand, J.).

B. The Right to Compulsory Process and to Confrontation.

The court's decision to uphold the district court's ruling that the discovery request should be quashed because it was "overly broad" and "burdensome"* is troubling for many reasons, not the least of which is that it conflicts with settled law in other circuits. Assuming,

*In the trial court, the government made no such contention, and offered no proof in support of such findings.

arguendo, that the request was burdensome, the proper remedy was to narrow the subpoena, not to quash it. The right to compulsory process may not be trampled merely for the sake of a discovery sanction. As the Fifth Circuit held in United States v. Goodwin, 625 F.2d 693, 704 (5th Cir. 1980), although the trial judge's decision to issue a subpoena is an exercise of his discretion, that discretion is subject to the constraints of the sixth amendment. Technical requirements such as timing and wording cannot outweigh this fundamental right.

Petitioner's concern here is not for a mere procedural technicality, but for the accused's fundamental constitutional right to confront and cross-examine the witnesses against him, see Davis v. Alaska, 415 U.S. 308 (1974), and to compulsory process. United States

v. Burr, 25 F.Cas. 187 (C.C.D.Va. 1807).* Petitioner is not seeking to impede the "determination of truth at trial" by suppressing evidence, cf. Stone v. Powell, 428 U.S. 465, 488-89 (1976)(Powell, J.). Rather, he seeks to carry out the search for truth. It is the prosecution which is attempting to withhold from the court, the accused and the jury relevant evidence which they need and which they have a right to examine. Such rights must not be lightly brushed aside, but must instead be carefully balanced against the government's asserted interest. Where the two conflict, the least restrictive alternative must be applied. See generally Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Indiana

*This case is like Burr, and not like United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982), because the petitioner has "never read the [requested material] and [is] unaware of its contents." 102 S.Ct. at 3449 n.8.

L. Rev. 711, 793-803 (1976). The court may not totally prohibit the defendant's exercise of his sixth amendment right where there is a less drastic way of preserving procedural requirements. Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972); United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981) ("[T]he compulsory process clause of the Sixth Amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants."); See also Ronson v. Commissioner of Corrections, 604 F.2d 176, 178-79 (2d Cir. 1979)(exclusion of insanity defense witness because of failure to give formal notice of intent to raise the defense violated sixth amendment; state's interest in restricting "truth gathering" must be "scrutinized closely"). Just as the sixth amendment forbids exclusion, sole-

ly as a discovery sanction, of otherwise admissible evidence offered by criminal defendants, so, too, it forbids the denial of compulsory process where necessary to effectively cross-examine a key government witness, solely as a sanction for seeking supposedly overbroad or belated discovery or failing to reiterate the magic word "Jencks." The court's decision thus conflicts with the Constitution and the Second and Fifth* Circuit cases cited above.

Most recently, over the dissent of Justices White, Brennan and Blackmun, this Court denied certiorari in a case presenting a similar issue. Taliaferro v. Maryland, No. 82-6483, 33 Crim. L. Rep. 4063 (May 23, 1983). This case is not burdened by the problems which may have troubled the court in Taliaferro.

*These Fifth Circuit cases are also the law in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)(en banc).

There, the trial court found the defendant was not diligent in locating the alibi witness whom he wished to call, but who had not been named in response to the prosecution's request for alibi witnesses. In the present case, petitioner was notified less than two weeks before trial that the government intended to offer the "expert" testimony of a DEA agent. The agent was not named. Petitioner promptly moved in limine to prevent the testimony. When that motion was denied, Petitioner moved for the discovery necessary to impeach him. Agent Cunniff was still on the stand giving his direct testimony at the time of the last discovery request.* Further, the Defendants had made several pretrial motions requesting discovery of Jencks material and material relating to any experts the government intended to

*Arguably, at least as to the Jencks material, a motion before that time could have been considered premature. 18 U.S.C. § 3500(b).

call, and had obtained an order requiring the prosecution to produce Jencks material five days prior to trial. Therefore, there is no diligence problem presented here. Nor in the present case did the Petitioner have any other means within his control for discovering the requested information. Cf. United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982). The issue is thus squarely presented here. Certiorari should be granted to resolve the conflict between the First Circuit and the Second, Fifth and Eleventh Circuits, and to prevent the trampling of these fundamental rights merely for the sake of a technical discovery sanction.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE FIRST CIRCUIT ON THE ONE HAND, AND THE SECOND, FIFTH, NINTH AND ELEVENTH CIRCUITS ON THE OTHER HAND, OVER WHETHER THE FEDERAL COURTS SHOULD PERMIT THE PROS-

ECUTION TO PUT ITS CASE AGENT ON THE STAND AS A PSEUDO-EXPERT TO VOUCH FOR ITS CASE.

The holding of the Court of Appeals that the pseudo-expert testimony of Agent Cunniff qualified as admissible under Rules 702 and 403, Fed. R. Evid. (App. 91a-93a), begs the most fundamental question preliminary to any determination under those rules: Was it relevant under Rules 401 and 402? Cunniff's testimony, as it related to Petitioner, was that, in his experience, drug smugglers used boats and radios to carry out their criminal purposes. Cunniff had no personal knowledge that Petitioner knew of the marijuana importation and distribution conspiracy, let alone that he intended to join it, when he provided a sports fishing boat to someone at Turkey Cove. Nor did Cunniff testify to any experience he had comparing the innocent use of sports fishing boats to the criminal use of

them, so as to permit a rational differentiation between the two. The trial court nonetheless ruled that the testimony was admissible, and the Court of Appeals affirmed. This holding places the First Circuit squarely in conflict with other circuits, but in accord with the reasoning which prevailed in the seventeenth century at witchcraft trials. According to this way of thinking, DEA Special Agent Cunniff was not the first expert witness to divine the peculiar ways of the fallen:

> There was also Dr. Brown of Norwich, a person of great knowledge; . . . and he was clearly of opinion, that the persons were bewitched; and said, That in Denmark there had been lately a great discovery of witches, who used the very same way of afflicting persons, by conveying pins into them, and crooked as these pins were, with needles and nails . . . .

A Trial of Witches at Bury St. Edmonds, 6 Howell's State Trials 687, 697 (1665).

The Fifth Circuit however, has held that similar testimony by a DEA agent did not pass that preliminary test of relevance. United States v. Hall, 653 F.2d 1002, 1006 (5th Cir. 1981).* There the agent

> testified as a kind of quasi-expert on DEA investigative procedures, and his testimony was limited to the general hypothetical descriptions of accepted practice that are typical of the expert witness. He testified to no facts bearing in any manner on the prosecution of Christopher Hall or on the investigation leading to that prosecution. His testimony had no tendency whatsoever to make the existence of any fact of consequence to the government's case in chief either more or less probable than it would have been without his testimony. See Fed. R. Evid. 401. Clearly, then, in the context of the government's case in chief, agent Donald's opinion testimony lacked substantial relevance to any matter in issue, and was, therefore, not admissible.

Similarly, Cunniff's testimony was of no assistance to the trier of fact

*This is also the law in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)(en banc).

because it "had no tendency to make the existence of any fact of consequence to the government's case . . . either more or less probable . . . ." The reason is simple: There was no comparison made between what drug smugglers described by Cunniff did, and what innocent people did. It was pseudo-science -- logically unsound but deceptive to a lay juror.

The fact that the testimony was overly persuasive, and thus highly prejudicial, is demonstrated by the panel's reliance on Cunniff's testimony in its determination of the sufficiency of the evidence. Such highly persuasive evidence could not have been harmless. As the court noted in Hall, "reduced to its essentials, [the agent's] testimony constituted little more than a (quasi-) expert commentary on the strength of the government's proof . . . . Such 'evi-

dence' has no place in a criminal trial." 653 F.2d at 1007. Accord, United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976), cert. denied, 429 U.S. 1045 (1977) (trial court properly excluded DEA agent's expert testimony about a common ploy used by narcotics smugglers to smuggle narcotics into the United States by planting them in secret compartments of suitcases provided to unwary travelers; no probative value of defendant's guilt); United States v. Stirling, 571 F.2d 708 (2d Cir.), cert. denied, 439 U.S. 824 (1978) (district court, in prosecution for mail fraud and conspiracy in sale of stock, correctly excluded testimony of state court judge that certain practices of corporation involved in defendant's scheme were "normal," "usual," or "proper.").

Allowing the admission of such testimony opens a door to serious abuse: The elevation of innocent behavior into

proof of guilt (even when there is an innocent explanation) based on the carelessly formulated and untested testimony of a pseudo-expert.* Cases allowing the admission of expert testimony to explain the use of jargon or the price of drugs, matters clearly beyond the ken of lay jurors, should not be expanded to permit the kind of hocus-pocus admitted here.

The court's decision may transform criminal trials. Whenever the government has a weak case, it will parade the case agent before the jurors to assure them that the accused behaved the way criminals do -- even though the agent has no experiential knowledge or logical basis

*This Court has recently expressed concern about similar speculation by law enforcement officers. A plurality held that evidence that a nervous young man paid cash for a one way ticket, carried American Tourister luggage, and traveled under an assumed name to New York, a so-called "target city," did not even rise to the level of probable cause for arrest. Florida v. Royer, ____ U.S. ___, 103 S.Ct. 1319 (1983) (White, J.).

to support the inference he asks the jury to draw. Already, the practice is spreading. See United States v. Payton, formerly reported in the advance sheet at 672 F.2d 1209 (D.C. Cir. 1982)(vacated and withdrawn on rehearing en banc); United States v. Thomas, 676 F.2d 531 (5th Cir. 1982); United States v. Johnson, 527 F.2d 1381, 1383 (D.C. Cir. 1976). The First Circuit should have stopped this perversion of criminal trials. Because it did not, the Supreme Court should resolve the conflict and decide this important point of federal law and practice.

In addition, the Court should appreciate that the speculative but spectacular nature of Cunniff's vouching testimony makes the discovery and disclosure issues of Points I and II above particularly well posed for review, and vice versa. The broadest possible lati-

tude should be given for the confrontation of controversial "experts" and their testimony should not be admitted without substantial discovery of the underlying data. See Advisory Committee's Note to Fed. R. Evid. 705.

IV.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE OPINION BELOW AND OTHERS LIKE IT AND THIS COURT'S DECISIONS IN UNITED STATES V. FALCONE, 311 U.S. 205 (1940), DIRECT SALES CO. V. UNITED STATES, 319 U.S. 703 (1943) AND INGRAM v. UNITED STATES, 360 U.S. 672 (1959).

A. The Opinion Conflicts with United States v. Falcone and its interpretation in Direct Sales Co. v. United States and with Decisions of the Second, Third, Fifth and Tenth Circuits Following Them.

Many years ago, Judge Learned Hand astutely observed that there is significant difference between a mere supplier of goods to an illegal conspiracy and a knowing, willful participant in the conspiracy.

> The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.

United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940). This Court attempted to clarify those distinctions in United States v. Falcone, 311 U.S. 205 (1940) and in Direct Sales Co. v. United States, 319 U.S. 703 (1943). The lower courts have been wrestling with the results ever since.

The courts of appeals, including the court below, are struggling to determine just what kind of, and how much, circumstantial evidence is sufficient to make out a crime in conspiracy cases. Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53

Colum. L. Rev. 228 (1953); United States v. Grunsfeld, 558 F.2d 1231 (6th Cir.), cert. denied, 434 U.S. 872 (1977) (rare, reasoned application of Falcone and Direct Sales); United States v. Rush, 666 F.2d 10 (2d Cir. 1981); United States v. Michelena-Orovio, 702 F.2d 496 (5th Cir. 1983); United States v. Dumas, 688 F.2d 84 (10th Cir. 1982). It is time for this Court to revisit Falcone and Direct Sales, make clear to the lower courts that it shares Judge Hand's concern about drag-net prosecutions, and straighten the guidelines which have, over the last forty years, become at least blurred, if not broken.

The problem has recently become more acute with the growth of the illegal drug industry. If drug importers have use for boats and radios, they also have use for cars, trucks, real estate, homes, clothing, money, financial services, legal

services and groceries. Where is the line to be drawn?

A brief discussion of the Falcone and Direct Sales cases may be helpful. In Falcone, the defendants supplied sugar, cans and yeast to illegal distillers. The defendants' convictions for conspiring to operate the stills were reversed by the Second Circuit, and the reversals were upheld by this Court.

Three years later, in Direct Sales, the Court explained its Falcone decision and attempted to sharpen the line between a lawful supplier of goods and a knowing, willful conspirator. There, the defendant, a registered drug manufacturer and wholesaler, conducted a mail order business. Over a period of seven years, it sold tremendous quantities of a restricted narcotic, in large doses, to a physician practicing in a small town. The defendant company offered a discount

for quantity sales, it was warned by the Bureau of Narcotics that it was being used as a source of supply by convicted physicians, but continued the sales. Under all these circumstances, the Court affirmed the conviction for conspiracy to violate the narcotics statute. This Court distinguished Falcone on four grounds: (1) The continuous course of dealing over seven years, 319 U.S. at 712 n.8; (2) The restricted nature of the goods being sold, 319 U.S. at 713; (3) The stimulation and instigation involved in the offering of quantity discounts, 319 U.S. at 713; (4) The "stake in the venture" which, while perhaps not essential, is relevant, 319 U.S. at 713.

The facts before this court below differ from the facts of Direct Sales in the same way in which the facts of Falcone do. (1) There was no long and

continuous course of dealing; (2) The boat and the communications and navigation equipment were not restricted items, but were "articles of free commerce" like the sugar, cans and yeast in Falcone; (3) There was no evidence of any stimulation or instigation by Petitioner; (4) There was no showing of any "stake in the venture".*

The First Circuit's bare, unelaborated holding that Falcone was "inappropriate here" and its affirmance of the conviction on these facts thus squarely conflicts with this Court's interpretation of that case in Direct Sales Co. v. United States. It also conflicts with several cases from other circuits holding Falcone applicable on similar facts.

The facts of the present case most closely parallel United States v. Gerke,

*In fact, a work list and a payroll list were both found at Turkey Cove. Neither Petitioner's name, nor any name ever identified with him, were on either (App. 68a, 109a, 110a).

125 F.2d 243 (3d Cir.), cert. denied, 316 U.S. 667 (1942). There, the defendants bought a boat which was later used by others to import illicit alcohol. Many of the factors which the government argued against Petitioner were present in Gerke: the use of large amounts of cash in small denominations, the use of a name other than his own, the outfitting of the boat with special equipment suitable for the illegal purpose, the arguably misleading stories given to the people with whom he dealt. But this was not enough.

> It would justify a finding that Robin and Watson purchased the vessel having in mind its sale to others or even that at the time they made the purchase they had received part payment of the agreed purchase price from the ultimate purchasers. It might conceivably justify an inference that they knew of the business to which the purchasers intended to put it. But the finding that these defendants for profit sold a vessel to persons who they knew intended to and later did use it in an il-

> legal enterprise will not support their conviction for the offense with which they are charged . . . . For there is no evidence that they participated in the conspiracy or knew of its existence . . . . We accordingly think the rule of the Falcone case is applicable . . . .

125 F.2d at 246. Parenthetically, The case against Petitioner Dill was even weaker than the case in Gerke. The name he used was not a false name, but was the name of a real person, Hubbard, who may have been the actual purchaser. Unlike the defendant in Gerke, Petitioner did not visit the boat after the transaction, but in fact, completely left the scene.

These distinctions were recently reiterated by the Fifth Circuit in United States v. Michelena-Orovio, 702 F.2d 496 (5th Cir.), rehearing denied, May 18, 1983. There, the court affirmed*

*That this issue is controversial is demonstrated by the dissent, 702 F.2d at 507-520.

the marijuana importation conspiracy conviction of a crew member on a boat which "reeked of marijuana," had no fishing equipment, and no cargo other than the contraband. But the court reversed his conviction for conspiracy to possess with intent to distribute marijuana, relying on the four points outlined above. 702 F.2d at 505-06. Accord, United States v. Dumas, 688 F.2d 84, 86 (10th Cir. 1982) ("defendant lacks the requisite criminal intent if he does not know the conspiracy's objective;" careful application of Direct Sales).

One of the cases relied on by the court in Dumas was United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970). There, the defendant supplied a gun to conspirators, who told him they would use it either to "pull the bank job" or to "pull something else." The Second Circuit held that defendant could not be

convicted of conspiring to rob a bank if he did not know that it was a bank that was to be robbed.

So much for the good news. It is ironic that the same court which decided Gallishaw recently held that Falcone is limited "to its strict facts." United States v. Rush, 666 F.2d 10, 11 (2d Cir. 1981).* The very idea of a lower federal court limiting a Supreme Court case to its facts should prompt certiorari. Worse, we have researched the literally hundreds of cases citing Falcone, Direct Sales or both, and are sad to report that these Supreme Court precedents are on their death beds. The courts have analyzed and applied them with varying degrees of candor and thoughtfulness, distinguished

*Two points must be made about Rush. First, it is far different from Petitioner's case, because the defendant in Rush conceded that he knew to what use the conspirators would put the money he loaned them. Second, a member of the Rush panel, Judge Timbers, sat on the panel below.

them away to mere shadows, or simply ignored them. See Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53 Colum. L. Rev. 228 (1953). Compare United States v. Federico, 658 F.2d 1337, 1343-44 (9th Cir. 1980)(evidence drug dealer said he was going to meet his supplier, met with defendant and a woman, and then delivered drugs, sufficient to uphold defendant's conspiracy conviction) with id. at 1344-1348 (dissenting opinion); and United States v. Alvarez, 610 F.2d 1250, 1256-57 (5th Cir. 1980)(reversing, with extensive discussion of Falcone and Direct Sales, drug conspiracy conviction of defendant who, while riding on a truck loaded with household appliances, nodded "yes" when asked if he planned to go to the unloading site) with United States v. Alvarez, 625 F.2d 1196 (5th Cir. 1980)(en banc), cert. denied, 451 U.S. 938 (1981)

(upholding Alvarez's conviction on rehearing, with no discussion of Falcone or Direct Sales); and United States v. Molovinsky, 688 F.2d 243, 246-47 (4th Cir. 1982) with 688 F.2d at 249-50 (dissenting opinion).

The Court in Gallishaw pointed out that the distinction is "one of the fine points in the law of conspiracy." 428 F.2d at 762. Either the First Circuit has missed it, or it has overruled Falcone and Direct Sales. In any event, the opinion below fairly represents the majority attitude which is to act as if these cases are dead.

Certiorari should be granted because major Supreme Court precedents construing a major and dangerous doctrine of extended criminal liability are being applied in highly conflicting ways. A few cases have remained faithful to the principles announced in those cases. The

vast majority have limited these Supreme Court precedents to their facts, either expressly or by indirection or by just plain ignoring them. If Falcone and Direct Sales are bad law, this Court should say so. If they are good law, this Court should say so and enforce them. This is the case for it because the facts herein pose the questions so clearly and powerfully.

B. The Conflict with Ingram v. United States, United States v. Michelena-Orovio, 702 F.2d 496 (5th Cir. 1983) and United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970).

The opinion below also wreaks havoc with Ingram v. United States, 360 U.S. 672 (1959). Ingram requires that, for a conspiracy conviction to stand, the government must prove that the defendant possessed "at least the degree of criminal intent necessary for the substantive offense itself." 360 U.S. at 678 (empha-

sis in original). In Ingram, the evidence showed that the defendants engaged with numerous others in a closely organized, large-scale numbers game, illegal under Georgia law, but not violative of any Federal statute. The "entrepreneurs" of the business did not pay the required federal taxes on their ill-gotten gains. The convictions, on tax conspiracy charges, of the defendants who were not entrepreneurs and who did not owe any federal taxes were reversed by the Supreme Court. This Court held that, while there may have been sufficient evidence to convict them of a conspiracy to violate Georgia law, that was not the charge against them. It was simply no more likely that they conspired to violate the federal tax laws than that they merely conspired to violate the Georgia laws. The government there, as did the government below, noted the

secrecy and furtiveness of the operations.

> Yet these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes. Certainly the secrecy of the operation did not go to show that knowledge.

360 U.S. at 679. By affirming Petitioner's conviction on the evidence adduced below, the court sanctioned the jury's inference of Petitioner's knowledge of the conspiracy and its purpose from the "secrecy of the operation."* The court required no proof of specific knowledge, and expressly approved generalized instructions which omitted this

*This Court recently recognized that facts showing similar furtiveness (the use of a false name, paying cash for tickets to a target city, and nervousness) did not even rise to the level of probable cause to arrest the accused on narcotics charges. Florida v. Royer, ___ U.S. ___, 103 S.Ct. 1319 (1983)(plurality opinion by White, J.). Here, as in the pre-arrest circumstances of Royer, there was nothing to show why the Petitioner was using a false name and paying cash for his purchases. There was nothing to show that he knew the people for whom he bought the boat were planning to import marijuana.

requirement (App. 89a-90a). It stated the requirement as "knowlege of the unlawful character of the plan" (App. 90a), with no requirement that the defendant have any knowledge of the nature of the planned violation.

The Fifth Circuit has recently demonstrated much more sensitivity to the problem of the kind of circumstantial evidence from which knowledge of the nature of the conspiracy may be inferred, but it, too, is having difficulty in drawing the line. See United States v. Michelena-Orovio, 702 F.2d 496 (5th Cir.), rehearing denied, May 18, 1983. The court reversed the conspiracy conviction of a crew member who knew marijuana was aboard the boat, who agreed to import it illegally and who participated in the scheme to import it, because the government failed to prove he had the intent to join a scheme to possess it with intent

to distribute it in the United States. In contrast, the court below affirmed the conspiracy to import and possess with intent to distribute conviction of a boat seller who supplied a boat which was never intended to contain marijuana, despite the fact that the government never proved that the petitioner knew of, let alone intended to join, any agreement involving marijuana. The two decisions exemplify the conflicting approaches to analyzing circumstantial evidence in conspiracy cases.

In its failure to apply Ingram to these facts, the First Circuit's decision below also conflicts with United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970) (defendant could only be convicted of conspiracy to rob a bank if he knew the gun he provided would be used to rob a bank). There the court reaffirmed the principle, totally disregarded

by the First Circuit below, that "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." 428 F.2d at 763. The opinion below pointed to no evidence that petitioner knew there was a marijuana conspiracy, or even a drug conspiracy (App. 86a-88a). While the court pointed to evidence supporting the inference that petitioner was being secretive with respect to the purchase of the boat, it never discussed how, if at all, that evidence showed that he knew the boat was to be used somehow in a marijuana importation, and possession conspiracy.*

*Incidentally, in affirming Petitioner's conspiracy conviction, the court found it necessary to rely on evidence of his activities prior to the inception of the conspiracy with which he was charged. This violates due process and the principles enunciated by the Court in Dunn v United States, 442 U.S. 100 (1979); Eaton v. City of Tulsa, 415 U.S. 697 (1974); and Presnell v. Georgia, 439 U.S. 14

footnote continued . . .

The First Circuit is thus in conflict with the Second Circuit on how and when to apply the rule of Ingram, "one of the fine points in the law of conspiracy." 428 F.2d at 762.

If Ingram was not ignored, then it, like Falcone and Direct Sales, was overruled. This is not a problem that is going to go away. The government has expanded its drag-net sweep in drug cases to reach for brokers, lawyers, financiers and banks. See, e.g., Beck, A New Attack on Drugs, Newsweek, July 20, 1981 at 30-31. This Court should make clear now what law should be applied in such cases. Moreover, if three major decisions of the Supreme Court are to be overruled, then such action should not be taken lightly, and it should be the Supreme Court that

footnote continued from page 55:
(1978). We will elaborate this defect in our discussion of the sufficiency of the evidence in our brief on the merits, if certiorari is granted. In any event, this pre-conspiratorial evidence proves neither specific intent nor knowledge.

does it. As things now stand, the rule of law is in trouble.

V.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A SERIOUS CONFLICT AMONG THE CIRCUITS ON WHETHER A GENERAL, ABSTRACT, EVEN IF LEGALLY CORRECT, JURY INSTRUCTION IS AN ADEQUATE SUBSTITUTE FOR SPECIFIC INSTRUCTIONS TAILORED TO THE FACTS OF THE CASE AND SPECIFIC INSTRUCTIONS SETTING OUT THE DEFENDANT'S THEORY OF THE CASE.

Petitioner furtively supplied a boat to persons who might have intended to use it as a pilot boat to assist in a single unconsummated marijuana importation. Thus, he was caught in a classic Falcone situation. United States v. Falcone, 311 U.S. 205 (1940). The Court's approval of generalized pattern jury instructions, despite Petitioner's request for more specific instructions on his theory of the case, violates two well-settled legal doctrines which have recently been the subject of conflicting decisions in several circuits.

First, a defendant is entitled to have special instructions given to the jury telling it about his theory of the defense. This used to be the law in the First Circuit, e.g., United States v. Leach, 427 F.2d 1107, 1112 (1st Cir.), cert. denied, 400 U.S. 829 (1970); Golden v. United States, 318 F.2d 357 (1st Cir. 1963); Greenberg v. United States, 295 F.2d 903, 970 (1st Cir. 1961), and remains the law in six other circuits. E.g., United States v. Alfonso-Perez, 535 F.2d 1362, 1365 (2d Cir. 1976); United States v. West, 666 F.2d 16, 20 (2d Cir. 1981)*; Strauss v. United States, 376 F.2d 416 (5th Cir. 1967); United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir.

*It is ironic that Judge Timbers, a member of the panel below, sitting by designation, wrote the opinion in West and reached a different conclusion there, applying the law of the Second Circuit, than he reached below, applying the law of the First Circuit. Certiorari should be granted simply because "a defendant's rights would be notably different depending upon the Circuit in which he is tried." Masri v. United States, 434 U.S. 907 (1977) (White, J., dissenting from denial of certiorari).

1979)("defendant is entitled to a charge which precisely and specifically, rather than generally or abstractly, points to the theory of his defense)*; United States v. Shackleford, 677 F.2d 422, 425-426 (5th Cir. 1982)("Charging the jury that a finding of specific intent to convert is required for conviction, while it may generally constitute the negative instruction (i.e., that if the defendant acted in good faith he could not have had the intent and knowledge required to convict him) does not sufficiently direct the jury's attention to the defense of abandonment"); United States v. Carroll, 518 F.2d 187 (6th Cir. 1975) (fact that court read the statute to the jury and defined its terms insufficient); United States v. Vole, 435 F.2d 774, 776-77 (7th Cir. 1970) ("the defendant in a criminal

*These Fifth Circuit decisions handed down before the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit as well. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

case is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous:"; instruction must specifically bring defense to the attention of the jury); United States v. Prieskorn, 658 F. 2d 631, 636 (8th Cir. 1981) (the court found the instructions given to be correct, but reversed for failure to give a properly requested instruction on defendant's theory of defense).

The decision below, however, aligns the First Circuit with the holdings of the Fourth and Tenth Circuits in two very recent cases, that an abstract, general instruction is sufficient even if the defendant properly requests instructions on his theory of defense. United States v. Head, 697 F.2d 1200 (4th Cir. 1983); United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983).

Thus, the First, Fourth and Tenth Circuits are in direct conflict with the Second, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits. This significant conflict should be resolved by this Court.

Second, a defendant is entitled to have instructions given to the jury tying the law to the facts of the particular case. "A judge has a duty to give instructions that are meaningful and translated, not in terms of mere abstract law, but into facts of the particular case." United States v. Piccolo, 696 F.2d 1162, 1170 (6th Cir. 1983); Choy v. Bouchelle, 436 F.2d 319, 325 (2d Cir. 1970) (failure to give instructions relating law to relevant facts in complex contract case constitutes plain error even though instructions given set forth the law in abstract fashion). The Fifth Circuit has "repeatedly held that 'a

Defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense' . . ." United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir. 1979) and cases cited therein. This used to be the law in the First Circuit, see Greenberg v. United States, 295 F.2d 903 (1st Cir. 1961), and case cited therein. By abandoning this sound and basic principle, the First Circuit has again placed itself in conflict with the Second, Fifth, Sixth and Eleventh Circuits.

The case at hand called out for adherence to these doctrines. Petitioner's conduct was in a gray area of the law not addressed by the black and white pattern instructions given to the jury.* Instruction on this "fine point

*Thirty years ago, one commentator noted that "jurors are left with little more than intuition in dealing with the difficult problem of the seller or purchaser. It is here that the

footnote continued . . .

of the law of conspiracy" was essential. United States v. Gallishaw, 428 F.2d 760, 762 (2d Cir. 1970).

The court's conclusory pronouncement that requested instructions based on Falcone "were inappropriate here" (App. 91a) is startling, to say the least. (See Point IV. above.) If Falcone is not applicable here, it is not applicable anywhere, and the First Circuit has, sub silentio, overruled it.

The First Circuit has held that neither the accused nor the jury have a right to particularized jury instructions if generalized instructions cover the essential elements of the crime (App. 89a-90a). This is a radical notion which impairs the right to trial by jury, changes established jury trial practice

footnote continued from page 62:
greatest need for improvement lies. Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53 Colum. L. Rev. 228 (1953). There is still a crying need for guidance here. This Court should provide it.

and destabilizes a substantial body of precedent. It is a source of growing conflict among the circuits. It is worthy of Supreme Court attention.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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